No. 09-0548

IN THE

# Supreme Court of the United States

JUDY WOOD ON BEHALF OF THE UNITED STATES OF AMERICA,

*Petitioner*,

*v.*

APPLIED RESEARCH ASSOCIATES, INC., SCIENCE APPLICATIONS INTERNATIONAL CORP., COMPUTER AIDED ENGINEERING ASSOCIATES, INC., DATASOURCE, INC., GEOSTATS, INC., GILSANZ MURRAY STEFICEK, LLP, HUGHES ASSOCIATES, INC., AJMAI ABASSI, EDUARDO KAUSEL, DAVID PARKS, DAVID SHARP, DANIELE VENEZANO, JOSEPH VAN DYCK, KASPAR WILLIAM, ROLF JENSEN & ASSOCIATES, INC., ROSENWASSER/GROSSMAN CONSULTING ENGINEERS, P.C., SIMPSON GUMPERTZ & HEGER, INC., S.K. GHOSH ASSOCIATES, INC., SKIDMORE OWINGS & MERRILL, LLP, TENG & ASSOCIATES, INC., UNDERWRITERS LABORATORIES, INC., WISS, JANNEY ELSTNER ASSOCIATES, INC. AND UNITED AIRLINES,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF RESPONDENTS, SIMPSON GUMPERTZ & HEGER, INC. AND COMPUTER AIDED ENGINEERING ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

DAVID J. HATEM, PC
DOUGLAS M. MARRANO
PATRICIA B. GARY
*Counsel of Record*
NEIL D. SCHNURBACH
DONOVAN HATEM LLP
2 Seaport Lane
Boston, MA 02110
617-406-4500

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

## CORPORATE DISCLOSURE STATEMENT

Respondent Simpson, Gumpertz & Heger, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Computer Aided Engineering Associates, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

## QUESTIONS PRESENTED

I. Whether a False Claims Act complaint which was dismissed pursuant to Fed. R. Civ. P. 9(b) for failure to provide any specific time, place or speaker of any alleged misrepresentation made by any defendant can automatically be amended based on the enactment of the Fraud Enforcement and Recovery Act, even if the modifications to the False Claims Act were not germane to the case.

II. Whether petitioner should be permitted to amend her complaint when the amendment would be futile because petitioner's False Claims Act complaint is premised on the flawed conclusion that the World Trade Center towers were destroyed by the United States military's directed energy weapons, rather than airplanes striking the towers.

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## STATEMENT OF THE CASE

On April 25, 2007, the Petitioner, Judy Wood ("Wood") commenced this action under the False Claims Act, 31 U.S.C. §§ 3729-33 by filing a *qui tam* Complaint under seal in the United States District Court for the Southern District of New York ("the District Court") against twenty-seven defendants including respondents Simpson Gumpertz & Heger, Inc. ("SGH") and Computer Aided Engineering Associates, Inc. ("CAE"). On September 12, 2007, the District Court (George B. Daniels, U.S.D.J.) entered an Order unsealing the Complaint and authorizing service. Wood, however, did not serve the Complaint on SGH, CAE, or the other defendants. On December 28, 2007, Wood filed a First Amended Complaint and took steps to effectuate service on the defendants. The First Amended Complaint alleged three causes of action under the False Claims Act ("FCA"): (1) Presentation of False Claims, (31 U.S.C. § 3729(a)(1)); (2) Making or Using False Record or Statement, (31 U.S.C. § 3729(a)(2)); and (3) Reverse False Claims, (31 U.S.C. § 3729(a)(7)).

Wood's claims against the defendants stem from her challenge to the investigative findings of the National Institute of Standards and Technology ("NIST") as to how and why the World Trade Center ("WTC") buildings collapsed after terrorist attacks on September 11, 2001. Wood claims that a terrorist attack was not responsible for the destruction of the WTC. Instead, she alleges that directed energy weapons ("DEW") in the possession of the United States military destroyed the WTC. Wood claims that all defendants participated in a fraud by con-

cluding in the NIST investigation that the impact of airplanes caused the collapse of the WTC.

Pursuant to motions of the defendants, including by CAE and SGH, on June 26, 2008, the District Court dismissed the First Amended Complaint finding *inter alia* that the District Court did not have subject matter jurisdiction over the claims because Wood was not the "original source" of information on which she relied to assert her claims under the FCA. The District Court held that Wood relied on publicly available information contained in the NIST administrative report ("NCSTAR 1"). The District Court also dismissed the First Amended Complaint because Wood failed to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), and failed to plead fraud with particularity as is required by Fed. R. Civ. P. 9(b). The District Court ruled the First Amended Complaint was too general and conclusory to meet the Rule 12(b)(6) or Rule 9(b) pleading standards. The District Court further refused to allow Wood to amend her First Amended Complaint on grounds of futility.

On July 16, 2009, the United States Court of Appeals for the Second Circuit ("the Second Circuit") affirmed the District Court's decision by Amended Summary Order. The Second Circuit ruled that the First Amended Complaint did not meet the pleading standard required by Fed. R. Civ. P. 9(b). The Second Circuit also affirmed the District Court's refusal to allow Wood to amend her complaint. The Second Circuit reasoned that Wood did not explain what particularity she would add to a second amended complaint. The Second Circuit also ruled

that the District Court did not abuse its discretion by concluding that amending Wood's First Amended Complaint would be futile. In affirming dismissal on these grounds, the Second Circuit did not reach the issue of subject matter jurisdiction.

## REASONS FOR DENIAL OF THE WRIT

### I. The Plaintiffs Claims Are Unaffected by the Changes to the FCA

Wood asserts that the retroactive changes to the FCA by the enactment of the Fraud Enforcement and Recovery Act ("FERA") authorize her to amend her First Amended Complaint. Specifically, Wood argues that complaints in all FCA cases pending as of June 7, 2008 should be amended to comport with the language in FERA. However, the FCA amendments are unrelated to Wood's claims, and Wood's claims are not entitled to mandatory amendment.

Congress enacted the FERA amendments in direct response to this Court's decision in *Allison Engine Co. v. United States ex. Rel. Sanders*, 128 S. Ct. 2123, 170 L.Ed.2d 1030 (2008). Prior to FERA, an FCA cause of action existed whenever a person "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement *to get* a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3279(a)(2) (emphasis added). As a result, this Court concluded that a claim failed as a matter of law if a government contractor used government money to pay a third-party subcontractor's false or fraudulent claim. Instead, this Court rea-

soned, in order for a subcontractor defendant to be found liable under the FCA, the false or fraudulent statement had to have been made in order to get the false claim paid or approved *by the government*. In other words, the subcontractor had to intend that the government pay the false claim directly, not the contractor paying the false claim with government funds. As a result, Congress amended the FCA and enacted FERA which removed the words "to get" from the language of the FCA upon which this Court relied in *Allison Engine*. Pursuant to this new standard, a party may be liable if it "[k]nowingly makes, uses or causes to be made or used a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). Congress enacted this change in order to avoid granting immunity to a party who defrauded the government but was not in direct privity with the government. *See* 111 H. Rpt. 97.

The narrow circumstance present in *Allison Engine* that led to the amendment of the FCA is not present in the instant case. Neither the District Court nor the Second Circuit decided this case based on the fact that any of the defendants were not in direct privity with the government. The FERA amendments to the FCA do not change either court's analysis of this case. The findings of those courts should not be disturbed.

Nothing in the FERA amendments to the FCA modifies the requirement that a party must plead its cause of action with particularity pursuant to Fed. R. Civ. P. 9(b). The Rule provides that "[i]n all averments of fraud or mistake, the circumstances consti-

tuting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Thus, to meet the requirements of Rule 9(b), a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993). In short, a plaintiff must "set forth the who, what, when, where and how of the alleged fraud." *United States ex rel. Sarafoglou v. Weill Med. College*, 451 F. Supp.2d 613, 621 (S.D.N.Y. 2006). These requirements promote the three purposes of Rule 9(b), "namely: (1) ensuring that defendants have sufficient notice of plaintiff's claims; (2) discouraging strike suits; and (3) preventing the filing of suits that simply hope to uncover the basis for some previously unspecified wrongdoing." *Id.*

Wood fails to link the defendants' allegedly fraudulent practices to the submission of even a single fraudulent claim even using the modified language from FERA. The Second Circuit correctly examined this issue by asserting that the "Amended Complaint makes no mention of any financial obligation that the Contractor Defendants owed to the government, and moreover, does not specifically reference any false records or statements used to decrease such an obligation." Pet. App. 8a-9a. Wood's theory of FCA fraud is based solely upon conjecture, surmise, and innuendo. Even if Wood were to be afforded the opportunity to amend her pleadings to conform with what she calls the more lenient pleading requirements of FERA, her allegations of fraudulent billing remain conclusory assumptions and are

devoid of the type of detail and specificity that a *qui tam* relator is required to allege to satisfy the requirements of Rule 9(b).

The recent amendment to the FCA does not change the fact that Wood failed to allege a single example of, much less the details of, a fraudulent claim. She has not, and will not be able to, identify a specific amount of charges that were submitted by a particular defendant, provide the date when a false claim was submitted, or provide a copy of a single invoice or bill that was paid. The Second Circuit correctly concluded, "the Amended Complaint fails to specify the time, place, speaker, and even the content of the alleged misrepresentations. In short, it lacks the particulars required by Rule 9(b)." Pet. App. 9a (quoting *Luce v. Edelstein*, 802 F.2d 49, 54 (2d Cir. 1986)).

Furthermore, Wood should not be permitted to plead generally at the outset and then fill in the gaps of her claims through discovery. "One of the purposes of Rule 9(b) is to discourage the filing of complaints as a pretext for discovery of unknown wrongs." *Madonna v. U.S.*, 878 F.2d 62, 66 (2d Cir. 1989). *See also Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 116 (2d Cir. 1982) ("Rule 9(b) [fails] in its purpose if conclusory generalizations ... permit a plaintiff to set off on a long and expensive discovery process in the hope of uncovering some sort of wrongdoing..."). Wood's Amended Complaint does not provide the type of detail Rule 9(b) requires. Wood has provided no basis on which this Court should conclude that allowing her to amend her

pleadings a second time would produce a complaint that is any more specific.

## II. Allowing Wood to Amend her Complaint Would Be Futile

Even if this Court allowed Wood to amend her complaint a second time, her theory of liability is implausible and would not survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss. In order to survive a Rule 12(b)(6) motion to dismiss, the factual allegations "must create the possibility for a right to relief that is more than speculative." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008). Wood's allegations are no more than speculative and do not demonstrate a right to relief. As a result, this Court should deny Wood's petition for writ of certiorari because any amendment to her Amended Complaint would be futile. *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 55 (2d Cir. 1995).

The plaintiff's entire cause of action is based on her unfathomable theory that the WTC was destroyed by the United States military's DEWs rather than the impact from two high speed jetliners. Pursuant to Wood's theory, defendants were not entitled to payment relating to services rendered to NIST because NIST did not reach the same conclusion as she. As the District Court correctly analyzed, in order for Wood to state a claim pursuant to the FCA, she must sufficiently allege the defendants knowingly presented a false or fraudulent claim, knowingly made or used a false record or statement to get a fraudulent claim paid, or knowingly made or used a

false record or statement to decrease their obligation to pay the Government. Pet. App. 31a. Even if Wood's far fetched allegations were true, this does not "give rise to a reasonable inference that defendants are not entitled to any compensation from the Government for the services they provided." Pet. App. 31a-32a. Wood bases her FCA claim on the unfounded allegation that the defendants are not entitled to compensation because the services that they rendered were "useless", and would only be entitled to compensation if they reached the same conclusions as she – namely that DEWs caused the destruction of the WTC. The District Court correctly stated that seeking payment for services rendered to NIST is not unlawful simply because Wood disagrees with the conclusion of NIST's investigative findings. "[P]urported errors based on flawed reasoning, mathematic calculations, or scientific judgments are not false for the purpose of the FCA." Pet. App. 32a. Even if this Court allowed Wood to amend her complaint a second time to comply with the new parameters of FERA, she still would not state a claim for which relief can be granted. As a result, her petition for writ of certiorari should be denied.

## III. Wood Did Not Base Her Appeal on the Modified Provisions of the FCA

FERA provides for the retroactive application of only one section of amendments to the FCA. Specifically, Congress retroactively modified 31 U.S.C. § 3279(a)(1)(B) formerly § 3729(a)(2) ("Section 3729 (a)(2)"). Wood did not base her Second Circuit appeal on the application of Section 3729(a)(2).

In her Second Circuit brief, Wood raised three bases for appeal:

> I. Does the submission of a Request for Correction (RFC) to the National Institute of Standards and Technology (NIST) by Dr. Judy Wood challenging as fraudulent a document prepared by NIST purporting to demonstrate "why and how the Twin Towers were destroyed" but which resulted in an admission by NIST that it "did not investigate the actual collapse" of the Towers overcome the public disclosure bar of under [*sic*] 31 U.S.C. § 3730(e)(4)(A) (because she disclosed the information) or constitute "original source" information for *qui tam* relator purposes per 31 U.S.C. § 3730(e)(4)(B); and under the edict of *Rockwell v. U.S.*, 549 U.S. 457, 127 S. Ct. 1397 (2007)?
>
> II. Does the submission of payment claims for professional services rendered in connection with NIST's [*sic*] preparation of NCSTAR I which is shown by Dr. Wood, the *qui tam* relator, to have been purposefully fraudulent in not fulfilling the mandated objective constitute a false or fraudulent claim by the appellees under the False Claims Act, 31 U.S.C. § 3279(a)(1)?
>
> III. Did the lower court err by not mentioning or considering the actual informa-

> tion upon which Dr. Wood's status as a *qui tam* relator such that, at a minimum remand for further proceedings in the court below is required?

Wood's Opening Brief to the Second Circuit Court of Appeals, Statement of Issues Presented, p. 2. Because Wood did not raise the application of Section 3279(a)(2) in her appellate brief, that issue is deemed waived in subsequent proceedings. *See Zhang v. Gonzales*, 426 F.3d 540, 545 n.7 (2d Cir. 2005).

Wood's challenge to Section 3279(a)(2) is equally moot because it was not germane to the decisions of the District Court or the Second Circuit. Neither court premised its decision on an interpretation of Section 3279(a)(2) and neither court made any mention of this section in its decision. The Second Circuit specifically considered the changes as outlined in FERA and stated that "[w]hile some of these changes [to the FCA] are retroactive, they do not change the analysis herein." Pet. App. 8a at n.2. The Second Circuit acknowledged changes to the FCA, considered those changes, and correctly concluded that they did not affect Wood's claims.

Because Wood's argument that changes to the FCA affected her claims is a red herring and had no bearing on the dismissal of Wood's First Amended Complaint, this Court should deny Wood's petition for writ of certiorari.

## CONCLUSION

For all of the above reasons, this Court should deny Judy Wood's Petition for a Writ of Certiorari.

Respectfully submitted,

David J. Hatem, PC
Douglas M. Marrano, Esq.
Patricia B. Gary, Esq.
*Counsel of Record*
Neil D. Schnurbach, Esq.
DONOVAN HATEM LLP
Two Seaport Lane
Boston, MA 02210
(617) 406-4500

*Counsel for Respondents Simpson, Gumpertz & Heger, Inc. and Computer Aided Engineering Associates, Inc.*